



OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 890

RIN 3206–AO18

Access to Federal Employees Health Benefits (FEHB) for Employees of Certain Tribally Controlled Schools

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: This rule finalizes an interim rule which expanded access to enrollment in the Federal Employees Health Benefits (FEHB) Program to additional tribal employees. The Consolidated Appropriations Act, 2021 (FY21 CAA) amended section 409 of the Indian Health Care Improvement Act and expanded entitlement to Indian tribes or tribal organizations carrying out programs under the Tribally Controlled Schools Act of 1988 (TCSA) to purchase coverage, rights, and benefits under the FEHB Program for their employees. This final rule adopts the interim final rule with minor clarifications.

DATES: Effective on [INSERT DATE OF PUBLICATION].

FOR FURTHER INFORMATION CONTACT: Julia Elam, Senior Policy Analyst, at julia.elam@opm.gov or (202) 606-2128.

SUPPLEMENTARY INFORMATION: On September 3, 2021, OPM issued an interim final rule (86 FR 49461) amending 5 CFR part 890, to expand access to enrollment in the FEHB Program to Indian tribes or tribal organizations carrying out programs under the Tribally Controlled Schools Act of 1988 (TCSA) for their employees. OPM provided 60 days for the public to comment on the interim final rule. The comment period expired on November 2, 2021. However, comments were not accepted on [regulations.gov](https://www.regulations.gov) during the first 18 days of the comment period due to a technical error. Therefore, OPM published an extension (86 FR 60357)

of the period for public comment on the interim final rule from November 2, 2021 to November 20, 2021.

OPM notes the following clarifications to the preamble of the interim final rule, 86 FR 49461. In the section on “Need for Regulatory Action,” footnotes 4 and 5 in the interim final rule should have been reversed. In the section on “Effects on Tribal Employees,” footnote 10 is listed twice. A new footnote 6 should be inserted after the sentence, stating “Another urgent concern is that American Indian/ Alaska Natives (AI/AN) experience health disparities, and, according to the Centers for Disease Control and Prevention (CDC), AI/AN have experienced disproportionate rates of infection and mortality during the COVID–19 pandemic.” This footnote 6 should have included a citation to a report located at <https://www.cdc.gov/mmwr/volumes/69/wr/mm6949a3.htm>. The current Footnotes 6 should be renumbered as footnote 7, and current footnotes 7-10 should be renumbered as 8-11. In the section on “Effects on Other Parties,” a footnote was made to the medical loss regulations without any text in accompanying footnote 13. The footnote should have included a citation to 77 FR 28790 and should be renumbered as footnote 12.

Authority for This Rulemaking

Section 1114 of the Consolidated Appropriations Act, 2021 (Pub. L. 116– 260) amended Section 409 of the Indian Health Care Improvement Act (25 U.S.C. 1647b) to extend entitlement to Indian tribes or tribal organizations carrying out programs under the TCSA (25 U.S.C. 2501 et seq.) to purchase coverage, rights and benefits under the FEHB Program for their employees.

The FEHB Program is administered by OPM in accordance with Title 5, Chapter 89, United States Code and implementing regulations (Title 5, parts 890, 892 and Title 48, Chapter 16).

The Patient Protection and Affordable Care Act (ACA) (Pub. L. 111–148) and the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111– 152), as amended extended

entitlement to Indian tribes and tribal organizations carrying out programs under the Indian Self-Determination and Education Assistance Act (ISDEAA) (Pub. L. 93– 638), and urban Indian organizations carrying out programs under Title V of the Indian Health Care Improvement Act (IHCIA) to purchase coverage, rights, and benefits under the FEHB Program for their employees, defined in the FEHB regulations as “tribal employees.” As the administrator of the FEHB Program, OPM extended eligibility to tribal employees of entitled tribal employers within the meaning of section 409 of the IHCIA. Tribal employers began purchasing FEHB for their employees on March 22, 2012 with coverage effective on May 1, 2012. As of January 2022, 138 tribal employers participate in the FEHB Program, and 11 of those are tribally controlled schools. As of January 2022, the total tribal enrollment in the FEHB Program is 34,333 with an estimated 63,000 covered lives.

Responses to Comments on the Interim Final Rule

OPM received 2 comments from the members of the public. One commenter noted all school employees should have the opportunity to be protected during the pandemic and expanding enrollment in the Federal Employees Health Benefits Program will expand access. Another commenter also expressed support for the rule. OPM appreciates the commenters’ support for the regulation and notes that this rule applies only to TCSA grant schools; schools operating under the ISDEAA (Pub. L. 93–638) were already entitled to purchase FEHB for tribal employees. As noted earlier in the rule, OPM is providing a cite the medical loss regulations which is a clarification. No other changes are made.

Expected Impact of the Final Rule

While this rule identifies TCSA grant schools as tribal employers entitled to purchase FEHB coverage for their tribal employees, pursuant to Public Law 116– 260, OPM does not believe this regulation will have a large impact on the broader health insurance markets. Currently, there are an estimated 4,533 eligible tribal employees of tribally controlled schools, including TCSA grant schools and “638 contract schools.” Eligible tribal employees are full-

time common law employees as determined by a tribal employer. There are an estimated 4,328 newly eligible tribal employees at TCSA grant schools. The impact on carriers is relatively small, as tribal enrollments make up 0.78 percent of enrollments in the FEHB Program. As of January 2022, 138 tribal employers participate in the FEHB Program, and 11 of those are tribally controlled schools. As of January 2022, the total tribal enrollment in the FEHB Program is 34,333 with an estimated 63,000 covered lives. Overall, as of March 2021 there are over 4.1 million separate enrollments in the FEHB Program, providing health insurance to about 8.2 million Federal employees, annuitants, certain tribal employees, and their family members covered by the FEHB Program.

For states with larger American Indian/Alaska Native (AI/AN) populations, OPM does not expect an outsized impact on local carriers as local carriers plans generally reflect the cost of their area. OPM does not anticipate that the newly eligible tribal employees will be significantly more expensive than other current FEHB enrollees in the same geographic region. For example, OPM estimates, for tribally controlled schools in which data is available, that in states with large AI/ AN populations, such as New Mexico, Arizona, and South Dakota, only about 1,899 tribal employees are eligible at TCSA grant schools. Therefore, OPM does not anticipate a material impact if these tribal enrollees were to enroll in FEHB coverage. For FEHB nationwide fee-for-service (FFS) plans, there will not be enough new enrollees in this group to have a material impact.

Effects on Other Parties

As described above, one expected impact of this rule is that affected tribal employees will gain access to health insurance plans with lower health insurance premiums. A reduction in those premiums reflects transfers between various parties involved in these transactions. The clearest effect is a transfer toward parties paying for health benefits absent the expansion of FEHB benefits, which largely include tribal employers and employees. This transfer is most likely to come initially from reductions in payments to health insurance providers or from offsetting

increases in FEHB health insurance premiums. We expect that, due to medical loss ratio¹ regulations, premiums largely reflect medical costs experienced by those insured by the plan. As a result, we expect that the rule will largely initially result in a transfer from those paying FEHB premiums (including enrollees and the Federal Government) in the baseline to entities who experience premium reductions under this rule. As described above, we expect these effects to be quite small.

Alternative Regulatory Approaches

OPM is unaware of feasible alternatives to this rule, as this regulation aligns FEHB eligibility with the FY21 CAA, which amended section 409 of the IHCA. Currently, OPM regulations do not include FEHB eligibility for Indian tribes or tribal organizations carrying out programs under the TCSA, and this rule expands eligibility along these lines.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). This final rule is not a significant regulatory action under E.O. 12866 and was not reviewed by OMB.

Regulatory Flexibility Act

OPM certifies this regulation will not have a significant economic impact on a substantial number of small entities.

Federalism

OPM has examined this rule in accordance with Executive Order 13132, Federalism, and have determined that this rule will not have any negative impact on the rights, roles and responsibilities of State, local, or Tribal governments.

Civil Justice Reform

¹ 77 FR 28790.

This regulation meets the applicable standard set forth in Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local or Tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

Congressional Review Act

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act) (5 U.S.C. 801 et seq.) requires rules (as defined in 5 U.S.C. 804) to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this action before its effective date, as required by 5 U.S.C. 801. OMB's Office of Information and Regulatory Affairs has determined that this is not a "major rule" as defined by the Congressional Review Act (5 U.S.C. 804(2)).

Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number.

This rule involves an OMB approved collection of information subject to the PRA for the FEHB Program, OMB Control Number 3206-0160, Health Benefits Election Form. The public reporting burden for this collection is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The total burden hour estimate for this form is 9,000 hours. The systems of record notice for this collection is:

OPM/Central-23, "FEHB Program Enrollment Records," available at <https://www.federalregister.gov/d/2021-01259>.

List of Subjects in 5 CFR Part 890

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Indians, Military personnel, Reporting and recordkeeping requirements, Retirement.

Accordingly, OPM adopts the interim rule published September 3, 2021, at 86 FR 49461, as final without change.

Office of Personnel Management.

Alexys Stanley,

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[FR Doc. 2022-07802 Filed: 4/12/2022 8:45 am; Publication Date: 4/13/2022]